

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

No. CV-04-25-FVS

In re METROPOLITAN SECURITIES  
LITIGATION

**AMENDED** ORDER DENYING  
RECONSIDERATION

**THIS MATTER** comes before the Court upon its own motion. Having reflected further upon the plaintiffs' motion for reconsideration (Ct. Rec. 1064), the Court vacates its original order (Ct. Rec. 1086) and substitutes this order.

**BACKGROUND**

During the Fall of 2001, Metropolitan Mortgage & Securities Co., Inc., ("Met") filed a registration statement with the Securities and Exchange Commission ("SEC") seeking permission to offer Series E-7 preferred stock to the public. The SEC declared the registration statement effective on November 14, 2001. At that point in time, Met was barred by the law of the State of Washington from selling the Series E-7 preferred stock in this state. The bar was not lifted until January 25, 2002. The plaintiffs added Count VI to their complaint on December 17, 2004; which was more than three years after the effective date of the registration statement (November 14, 2001),

1 but less than three years after the plaintiffs began selling the  
2 Series E-7 preferred stock (January 25, 2002). PricewaterhouseCoopers  
3 ("PwC") asked the Court to dismiss, as time-barred, that part of Count  
4 VI which related to the Series E-7 preferred stock covered by the  
5 November 14th registration statement. 15 U.S.C. § 77m ("In no event  
6 shall . . . [an] action be brought to enforce a liability created  
7 under section 77k . . . more than three years after the security was  
8 bona fide offered to the public."). PwC argued, and the Court agreed,  
9 the clock began to run upon the effective date of the registration  
10 statement rather than upon the date Met was freed from the state  
11 restriction that had prevented Met from selling the securities in  
12 Washington. The plaintiffs think the Court erred. According to them,  
13 a security is not bona fide offered to the public within the meaning  
14 of § 77m until the security is genuinely offered to the public. *Cf.*  
15 *P. Stolz Family Partnership L.P. v. Daum*, 355 F.3d 92, 103 n. 6 (2d  
16 Cir.2004) ("The relevant question for § 13 is when was the stock  
17 really and truly (genuinely) being offered to the public, as opposed  
18 to, say, a simulated offering."). The plaintiffs maintain the Series  
19 E-7 preferred stock was not genuinely offered to the public until  
20 January 25, 2002.  
21  
22

### 23 RULING

24 The plaintiffs argue the legislative history and text of §  
25 4(3)(B) of the Securities Act of 1933, 15 U.S.C. § 77d(3)(B),  
26 demonstrate Congress anticipated a security might not be bona fide

1 offered to the public upon the date the SEC declares the registration  
2 statement effective. Section 77d states in pertinent part:

3 The provisions of section 77e of this title shall not apply  
4 to --

5 . . . . .

6 (3) transactions by a dealer (including an underwriter no  
7 longer acting as an underwriter in respect of the security  
8 involved in such transaction), except --

9 . . . . .

10 (B) transactions in a security as to which a registration  
11 statement has been filed taking place prior to the  
12 expiration of forty days after the effective date of such  
13 registration statement or prior to the expiration of forty  
14 days after the first date upon which the security was bona  
15 fide offered to the public by the issuer or by or through an  
16 underwriter after such effective date, whichever is later[.]

17 15 U.S.C. § 77d(3) (B). In essence, "[s]ection 4(3) provides an  
18 exemption from the prospectus delivery requirements for certain  
19 transactions by dealers. . . . If a registration statement has been  
20 filed, section 4(3) (B) provides that the exemption applies during the  
21 first forty days after (1) the securities were offered to the public  
22 or (2) the effective date, whichever is later." Thomas Lee Hazen,  
23 *Federal Securities Law* at 50 (2d ed. Federal Judicial Center 2003).  
24 Thus, insofar as section 4(3) (B) is concerned, the effective date of a  
25 registration statement and the date upon which securities are offered  
26 to the public may be different dates. *Cf. Morse v. Peat, Marwick,*  
*Mitchell & Co.*, 445 F.Supp. 619, 622 n.5 (S.D.N.Y.1977) (quoting a  
passage from a House Report). The issue is whether Congress had  
something similar in mind when it enacted § 13. There is some support

1 for the plaintiffs' interpretation of the statute. After all, § 13  
2 does not say "more than three years after the registration statement  
3 was declared effective"; it says "more than three years after the  
4 security was bona fide offered to the public[.]" 15 U.S.C. § 77m.  
5 Nevertheless, the Court is not convinced the plaintiffs are correct.  
6 For one thing, the plaintiffs have not demonstrated the policy  
7 considerations upon which § 77d(3)(B) is based apply with equal force  
8 in the context of § 77m. For another thing, those few courts that  
9 have discussed the question posed by the plaintiffs -- viz., when is a  
10 registered security bona fide offered to the public for purposes of §  
11 13? -- have agreed "a security is 'bona fide offered to the public' at  
12 the effective date of the registration statement[.]" *Griffin v.*  
13 *PaineWebber, Inc.*, 84 F.Supp.2d 508, 512 (S.D.N.Y.2000) (quoting  
14 *Finkel v. Stratton Corp.*, 962 F.2d 169, 173 (2d Cir.1992)). As a  
15 result, the Court denies the plaintiffs' motion for reconsideration.  
16

17 **IT IS HEREBY ORDERED:**

- 18 1. The plaintiffs' motion to expedite (Ct. Rec. 1066) is **granted**.
- 19 2. The plaintiffs' motion for reconsideration (Ct. Rec. 1064) is  
20 denied.  
21
- 22 3. The plaintiffs' alternative request for clarification (Ct.  
23 **Rec. 1064**) is **granted**. The Court's order of February 8, 2010 (Ct.  
24 Rec. 973) is limited to that part of Count VI which relates to the  
25 Series E-7 preferred stock covered by the November 14, 2001,  
26 registration statement.

1           **IT IS SO ORDERED.** The District Court Executive is hereby  
2 directed to enter this order and furnish copies to counsel.

3           **DATED** this   24th   day of February, 2010.

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5                                        s/ Fred Van Sickle           
6                               Fred Van Sickle  
7                               Senior United States District Judge  
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